

No. 82-1602

In the Supreme Court
OF THE
United States

October Term, 1982

PHOENIX BAPTIST HOSPITAL AND MEDICAL CENTER, INC.,
Petitioner,

vs.

SHS HOSPITAL CORPORATION, JCL HOSPITAL CORPORATION
AND LINCOLN SAMARITIAN HOSPITAL AND HEALTH CENTER,
Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

I. THE WRIT OF CERTIORARI SHOULD BE GRANTED
TO RESOLVE THE ADMITTED AND GROWING CON-
FLICT AMONG THE CIRCUITS ON WHETHER COM-
PULSION IS AN ELEMENT OF THE STATE ACTION
DEFENSE

The Ninth Circuit exempted respondents' concerted activity from antitrust scrutiny even though it was conceded that there was no state or federal statute or regulation which required their joint venture. Respondents concede that the Ninth Circuit's interpretation of the *Parker v. Brown*, 317 U.S. 341 (1943), state action defense conflicts with that of at least the Fifth Circuit where state compulsion has been held to be a necessary element. *United States v. Southern Motor Carriers Rate Conference*, 702 F.2d 532 (5th Cir. 1983) (*en banc*); *Affiliated Capital Corp. v. City of Houston*, 700 F.2d 226 (5th Cir. 1983). This conflict among

the Circuits is growing and is reflected in other cases now pending on this Court's docket. *Hospital Building Co. v. Trustees of Rex Hospital*, 691 F.2d 678 (4th Cir. 1982) (Nos. 82-1633 and 82-1762); *Westborough Mall, Inc. v. City of Cape Girardeau*, 1983-1 CCH Trade Cas. ¶ 65,240 (8th Cir. 1982) (No. 82-1642); and *Ronwin v. State Bar of Arizona*, 686 F.2d 692 (9th Cir. 1982) (No. 82-1474).

The proper interpretation of the state action defense is an issue which has troubled and divided the lower courts, particularly in the context of the competitive activities of hospitals. *Hospital Building Co. v. Trustees of Rex Hospital*, *supra* (limited state action defense sustained); *Huron Valley Hospital, Inc. v. City of Pontiac*, 666 F.2d 1029 (6th Cir. 1981) (summary judgment based in part on state action defense reversed); *City of Fairfax v. Fairfax Hospital Association*, 562 F.2d 280 (4th Cir. 1977), *vacated* 435 U.S. 992 (1978), *on remand* 598 F.2d 835 (4th Cir. 1978) (defense rejected); *North Carolina ex rel. Edminsten v. P. I. A. Ashville, Inc.*, 1982-2 CCH Trade Cas. ¶ 64,764 (E.D.N.C. 1981), *appeal pending* No. 82-1058 (4th Cir.) (defense accepted). This conflict among the Circuits on an important issue of antitrust law in a major segment of our economy should be considered and resolved by this Court.

II. THE NINTH CIRCUIT'S INTERPRETATION OF THE NOERR-PENNINGTON DEFENSE CONFLICTS WITH THE DECISIONS OF THE OTHER CIRCUITS

Respondents unsuccessfully attempt to reconcile the Ninth Circuit's interpretation of the *Noerr-Pennington* defense with the contrary decisions by the Fourth Circuit in *Hospital Building Co.* and by the Sixth Circuit in *Huron Valley Hospital*. In *Hospital Building Co.*, the Fourth Circuit held that the plaintiff hospital had proved at trial that its competitors' activities before the local health planning agency fell within the sham exception to the *Noerr-*

Pennington defense. To the same effect, in *Huron Valley Hospital*, the Sixth Circuit reversed a summary judgment for the defendant hospitals based on the *Noerr-Pennnington* defense. Neither of these decisions can be reconciled with the Ninth Circuit's ruling dismissing petitioner's complaint on the basis of this defense without even affording the opportunity for discovery.

Other cases now before this Court also present this conflict among the Circuits. *E.g.*, *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (7th Cir. 1982) (tort claims brought with probable cause can violate antitrust laws if brought to harass notwithstanding *Noerr-Pennington* defense), *certiorari pending* No. 82-1665; *Westborough Mall, Inc. v. City of Cape Girardeau*, *supra* (successful efforts to obtain zoning changes not necessarily protected by *Noerr-Pennington*), *certiorari pending* No. 82-1642. This conflict should be considered and resolved by this Court.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

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